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ASSUMPTION OF LIABILITY BY MORTGAGOR'S TRANSFEREE.

"On the sale of property subject to incumbrances, the vendor gets the price of his interest, whatever it may be, * * together with an indemnity against the incumbrances affecting the land. The contract of indemnity may be express or implied. If the purchaser covenants with the vendor to pay the incumbrances, it is still nothing more than a contract of indemnity. The purchaser takes the property subject to the burthen attached to it. If the incumbrances turn out to be invalid, the vendor has nothing to complain of."—*Musammat Izzat-un-Nissa Begam* v. *Kunwar Pertab Singh*[1]. This is the latest and most authoritative statement of the rights and liabilities, *as between a mortgagor and his assignee* in respect of the mortgage debt (See S. 55, Cl. (*d*) of the Transfer of Property Act). A further question of interest arising in connection with such transfers is that relating to the rights of the *mortgagee* as against the transferree of the equity of redemption. The mortgagee can, of course, claim to be paid his debt by sale of the mortgaged property, whether it be in the hands of the mortgagor or of his assignee. But if the sale proceeds do not suffice to discharge the mortgage debt, has the mortgagee any further remedy as against the mortgagor's assignee? We advisedly say 'remedy,' for if the courts would in any case allow the mortgagee some way of reaching the estate of the mortgagor's assignee, it is immaterial whether or not the law recognises a *right* in the former as against the latter. The distinction will become more apparent as we proceed.

In a recent case before the Allahabad High Court—*Jamna Das* v. *Ramautar Pande*[2]—the question was raised and reliance was placed on certain passages in American text-books. But the learned Judges (*Richards* and *Griffin* JJ.), referring to the absence

1. (1909) I.L.R. 31 A. 583. 2. (1909) I.L.R. 31 A. 352.

of English authority, declined to discuss the point. The matter came up on an application under S. 90 of the Transfer of Property Act, and it was contended that the assignee of the equity of redemption had, by virtue of his agreement with his transferor (the mortgagor), become personally liable to the mortgagee so as to bring the case within that section. The learned Judges observe: "In our opinion, this contention is not sound. Jamna Das (the mortgagee) was no party to the contract between Lakhpati Kuar (the mortgagor) and Ramautar Pande (the assignee.) No Indian or English case has been cited to us in which it has been ever held or suggested that the transferee of the equity of redemption in mortgaged property becomes personally liable to the mortgagee." It is not here proposed to discuss whether in any case the mortgagee can, as against the assignee of the equity of redemption, take proceedings under S. 90 of the Transfer of Property Act. We shall confine ourselves to the general question, whether, and if so under what circumstances, a mortgagee can, for the satisfaction of the mortgage debt, have resort to the estate of an assignee of the equity of redemption.

Cases on the two extremes may easily be disposed of. Where, as in *Oxford* (*Earl of*) v. *Rodney*[1] the assignee of the equity of redemption enters into covenants with the mortgagee himself as to the payment of the mortgage debt, he becomes, of course, personally liable. But no such covenant could be implied from the mere fact that the assignee pays *interest* on the mortgage amount direct to the mortgagee (*In re Errington—Exp. Mason*[2]) nor even from a covenant to pay a higher rate of interest than that provided for in the mortgage (*Shafto* v. *Shafto*[3]) for, as was observed by *Vaughan Williams* J., this is 'a perfectly natural act, and is done in order to preserve the mortgaged property from foreclosure.' On the other hand, where all that appears is the mere fact of the property purchased by a person being subject to a mortgage, it is clear that the purchaser incurs no *personal* liability, *either to the mortgagor or to the mortgagee,* in respect of the mortgage debt. In one case (*Reference under the Stamp Act,* [4]) the Calcutta High Court observed that, under the general law, the purchaser of the equity of redemption does not take upon himself the personal liability of the transferor, but the learned Judges added: "It is possible that S. 55 (of the Transfer of Property Act) may effect

1. (1807) 14 Ves. 417.
2. L.R., (1894) 1 Q. B. 11.
3. (1786) 1 Cox. 207.
4. (1883) I.L.R. 10 C. at p. 96.

some alteration in the law in this respect." The section has, however, never since been interpreted as altering the law. 'He (the purchaser) may give up the property at any time in satisfaction of the mortgage lien and he is not liable either legally or equitably to indemnify his grantor against the mortgage' (JONES on *Mortgages*, S. 738), though *if he retains the property* and his vendor (the mortgagor) is compelled on his personal obligation to pay the debt (*Quaere*,—if this would be possible in this country) 'the Court would raise upon his conscience an obligation to indemnify the vendor'—*Waring* v. *Ward* [1].

It is in cases in which, as between the mortgagor and his assignee, the latter assumes upon himself, whether expressly or by clear implication, the payment of the mortgage debt, that difficulty arises.

We may first take the case in which there is in terms a contract between the mortgagor and his assignee that the latter is to pay the mortgage debt. It is clear that the mortgagee, who is a stranger to this contract, cannot directly seek to enforce it. On this point there seems to be very great divergence of judicial views among the courts of the United States, but in England and in this country, it will be impossible to support any right in the mortgagee to enforce the contract—see *Tweddel* v. *Tweddel*[2]. It is, therefore, unnecessary to refer here to the conflicting views of the American courts on this point (see JONES, S.758, etc., and an interesting article, headed 'Contracts for the Benefit of a Third Person', by Professor Williston in the *Harvard Law Review*, Vol. XV. p. 767 at pp, 787 to 791). As a matter of equity, however, certain aspects of the question are put forward in the American authorities which deserve to be considered. But it is necessary at the outset to advert to one fundamental difference that appears to exist between the English and American views as to the nature of the contract between the mortgagor and his assignee, as this will help, in some measure, to explain the difference between the English and American rules relating to the present question.

As appears from the passage quoted at the beginning of this article, the theory of the English law is that the contract between the mortgagor and his assignee is only one of indemnity and the mortgagor has a cause of action on the covenant only if he is compelled to pay the mortgage debt. The assignee could question the validity or existence of the mortgage and if it turns out to be unenforceable he has the benefit of it. (The observations, to a

1. (1802) 7 Ves. at p. 387. 2. (1787) 2 Bro. C.C. 152.

contrary effect, in para 936 of DR. GOUR'S *Transfer of Property Act*, are based apparently upon the decision of the Allahabad High Court in *Inayat Sing* v. *Izzat-unnissa*[1] which has now been reversed by the Privy Council). Some of the American authorities would, however, seem to construe the agreement of the assignee to pay the mortgage debt as amounting not merely to a contract of indemnity, but a promise to pay a certain amount to a third person, which, if not fulfilled, would give the promisee (the mortgagor) a right to recover the amount, and in this view it would be immaterial whether or not the mortgagee had compelled the mortgagor to pay (JONES, Ss. 768, 769.) The mortgage amount is treated as a portion of the consideration for the transfer, and the transferor is, in any event, entitled to the benefit of it. According to the American cases, the assignee cannot, in such circumstances, dispute the existence or validity of the mortgage which he has assumed to pay.

Before referring to the few English cases that seem to throw any light on the question under consideration, there remains one more observation to be made. The actual point arising for decision in most of them was not whether the mortgagee was entitled to proceed against the mortgagor's assignee for the recovery of his debt, but whether, as between the *real* and *personal* estates of the assignee, the mortgage debt was a *real* or *personal* obligation. It has been suggested that even when the assignee has clearly rendered himself liable to be sued by the mortgagee, the debt should, for the purpose of the above rule, be regarded as a real one (see ROBBINS on *Mortgages* p. 763). And on the other hand, referring to *Parsons* v. *Freeman*,[2] Mr. Cox, in his Note to *Evelyn* v. *Evelyn*[3] observes that in that particular case "the Court thought that although the covenant was with the vendor *only* and the vendee's personal estate, therefore, not liable in that respect to the *mortgagee*, yet the words were sufficiently strong to show an intention in the vendee to make it his *personal* debt." This would dissociate the present topic from the subject of the discussion in these cases, and, in any view, they have but an indirect bearing on the question.

The early English cases on the question of the respective liability of the *real* and *personal* estates of the assignee for the mortgage debt are collected in Mr. Cox's Note to *Evelyn* v. *Evelyn*[3]. This note, which has acquired high authority by the approval expressed of it in numerous later decisions, does not discuss

1. (1904) I.L.R. 27 A. 97. 2. (1751) Amb. 115.
3. (1731) 2 P. Wms. 673.

the question in the aspect now under consideration. So far as the cases there collected throw any light on it, the principle deducible from them may be stated thus :—

" Where a man buys subject to a mortgage and has no connection or contract or communication with the mortgagee and does no other act to show an intention to transfer that debt *from the estate to himself as between his heir and executor* but merely that which he must do if he pays a less price in consequence of that mortgage, that is, indemnifies the vendor against it, he does not by that act take the debt upon himself personally"—per Sir *R. P. Arden* M. R. in *Woods* v. *Huntingford*.[1] The Master of the Rolls states this rule to be the result of *Tweddel* v. *Tweddel*.[2] The decision of Lord *Thurlow* in this latter case has, on the facts of that case, often been regarded as laying down an extreme view of the rule of non-liability of the *personal* estate, and sometimes even questioned, as inconsistent with earlier decisions of authority (see observations of Sir *W. Grant* M.R. in *Oxford* v. *Rodney*[3]). The Master of the Rolls explains the basis of Lord *Thurlow's* judgment thus:—"The contract (of the assignee) was nothing more than a contract of indemnity against the mortgage; *it was not a contract giving any direct and immediate right against himself to the mortgagee*, but only indemnifying the mortgagor in case he should be sued by the mortgagee"—the italics are ours. "The principle," adds Sir *W. Grant*, "is right." We must therefore take the rule above stated as well-established in English law.

Leaving alone, therefore, the cases which recognise a right in the mortgagee to enforce the contract between the mortgagor and his assignee, there is another line of authorities in the American courts, resting on a different principle, which allow the mortgagee to benefit, though under certain limitations, by the contract between the mortgagor and the transferee of the equity of redemption. The *rationale* of this class of decisions is thus explained in a leading American text book :—

" As between the parties to the deed, the grantee thereby becomes the principal debtor for the mortgage debt, which has been allowed to him out of the purchase-money, and the grantor is thenceforward merely a surety for the debt; and then, upon the familiar principle that the creditor is entitled by way of equitable subrogation to all securities held by a surety of the principal debtor, the mortgagee is entitled to the benefit of this agreement

1. (1796) 3 Ves. 128 at P. 132. 2. (1787) 2 Bro. C. C 101; 152.
3. (1807) 14 Ves. 417.

made by the purchaser, although he did not know of its existence till long afterwards. A court of equity, having the mortgagor, the mortgagee, and the grantee before it, may adjust in one suit the rights of all the parties. In different forms this is in substance the doctrine of the cases. *The right of the mortgagee to this remedy does not result from any fixed or vested right in him, arising either from the acceptance by the subsequent purchaser of the conveyance of the mortgaged premises, or from the obligation of the grantee to pay the mortgage debt as between himself and his grantor.* The mortgagee's relief depends upon no original equity residing in himself, but upon the right of the mortgagor against his grantee, to which the mortgagee succeeds. Then he is allowed in equity to recover a *deficiency* of the grantee *by a mere rule of procedure*, going directly as a creditor against the grantee, *in order to avoid circuity of action*, and save the mortgagor, as an intermediate party, from being harassed for the payment of the debt, and then driven to seek relief over against his grantee, upon whom the liability would ultimately fall. To support an action upon this ground, therefore, it is necessary in the first place that the grantor, in whose favour the stipulation is made, should himself be personally liable for the debt assumed by the grantee; and in the second place, that there be a debt or some obligation, on the part of the person assuming the payment of the mortgage, to support his undertaking."—JONES on *Mortgages*, Ss.755, 755 *a*, 761 *b*. (The italics are ours.) See also SHELDON on *Subrogation*, S. 185; and POMEROY'S *Equity Jurisprudence* S.—1207.

It would be noticed that this view does not violate the English doctrine of privity of contract. It is only as a matter of *procedure* that the American courts have sought to adjust once for all the rights of the *three* parties when they are *all* before the court. The mortgagee cannot proceed against the transferee of the equity of redemption to recover the amount of the mortgage as a *debt* due by him, but upon the completion of regular foreclosure or sale proceedings on the mortgage, he can, to pay himself the *deficiency*, if any, claim to be subrogated to the mortgagor's right of indemnity against the assignee. Consistently with the established principles of procedure in England and in India, is it possible here to follow the above rule of American law?

S. V.

(To be continued.)

NOTES OF INDIAN CASES.

Lutchmee Das and another v. The Secretary of State for India in Council.—I. L. R. 32 M. 456 —Questions as to the power of Government to levy cess under Madras Act VII of 1865 in respect of lands comprised in Inams and Zemindaries often now arise for decision. It was contended in this case that the cess which the Government is entitled to impose under Madras Act VII of 1865 is a tax, and that therefore the fact that the Government had granted an Inam did not preclude it from levying the tax under an Act of the Legislature passed subsequent to the granting of the Inam. Act VII of 1865, however, specially provides that where a Zemindar or Inamdar is, by virtue of engagements with Government entitled to irrigation free of separate charge, no cess shall be imposed for the water taken in pursuance of the engagement. In the case of lands held under a permanent settlement prior to the Act, it was not in the contemplation of the parties that the Government would levy a cess, and hence there is no express engagement. The question in such cases is only whether an engagement can be implied, and, although it is always a difficult question whether the circumstances raise such implication, some principle should be observed in arriving at a decision. A grant of land in the case of a private person necessarily includes a grant of the water in such land. In the present case, from the settlement with the Inam Commissioner an engagement is implied. The other question decided in this case, namely, that payment made under threat of distress and sale, although no warrant of distress had been issued, is not a voluntary payment, is now covered by authority—see *Narayanaswami Reddi* v. *Osuru Reddi*[1].

The Administrator-General of Madras v. The Official Assignee of Madras.—I.L.R. 32 M. 462.—The question in this case was whether when one of two partners died and the surviving partner filed his schedule, the administrator of the deceased partner or the Official Assignee on behalf of the insolvent partner, was entitled to realise the partnership assets including the share of the deceased partner. Upon principle we think there is only one answer to the question, namely, that the surviving partner or the Official Assignee in whom the insolvent's estate is vested will be the only person entitled to realise the assets of the partnership. On the death of a partner the partnership is dissolved. Notwithstanding the dissolution, the rights and obligations of the partners continue in all things necessary for winding up the

1. (1902) 25 M. 548.

business of the partnership (S. 263, Contract Act.) The executor of the deceased partner, however, is not entitled to join the surviving partner in the winding up—see *Sidhappa* v. *Shivalingappa*[1]. The surviving partners, have therefore, the power to do all things necessary for the winding up of the partnership, and this power necessarily carries with it the power to realise the assets. We think, therefore, that the right of the surviving partner to realise the assets for the purpose of winding up is more a power than any thing else although at the same time it may be a power coupled with an obligation. Even under the old Act (The Indian Insolvency Act, 11 & 12 Vict., C. 21.) such a power vested in the insolvent will vest in the Official Assignee. If it is not a power it is a right which also vests in the Official Assignee under S. 7. The fact that obligations are attached to the power or to the right does not make the subject-matter with reference to which the power or right is exercisable, property not vesting in the Official Assignee. In the case where a father or manager of a joint Hindu family becomes insolvent (and the debts incurred by such father or manager are binding upon the family) some difficulty has been felt whether the power of the father or the manager to sell the entire property of the family (including the shares of the members who have not applied for insolvency) is a power within the meaning of S. 30 of the Insolvency Act as it cannot be said that the power is one exercisable for the benefit of the insolvent. But, in cases where a surviving partner of a firm has applied for insolvency on the ground that the firm itself has become insolvent the right of the surviving partner to realise the assets is a right exercisable not merely for the benefit of the firm but also for the benefit of himself, and therefore no such difficulty will arise as has been felt in the case of the father or the managing member. The contention in the case under notice was that the right was personal and was such as cannot be delegated to or devolve by reason of the adjudication on the Official Assignee. The Court had no difficulty in saying that this was not the nature of the right.

Durpati Bibi v. **Ram Rach Pal.**—I. L. R. 31 A. 527.—The language of S. 285 of the Civil Procedure Code of 1882 has given rise to a number of conflicting rulings as to the effect of an execution sale held by a Court of inferior grade in violation of that section. The question is no longer of importance, having regard to the express provision made in Clause (2) of the corresponding section (S. 64) of the Code of 1908, to the effect that

1. (1899) 1 Bom. L.R. 42.

nothing in the section shall be deemed to invalidate any proceeding taken by a Court executing one of such decrees.

Prag Narain v. Kamakhia Singh.—I. L. R. 31 A. 551 (P.C.)—Having regard to the position and language of S. 583 of the Code of 1882, it was contended in this case that restitution could be had by summary proceedings only in connection with decrees passed in *appeals under Chapter XLI.* But this defect has been remedied in the new Code, which, in recognition of the fact that restitution is one of the fundamental principles of processual law, has made provision for it in very wide language in S. 144. One point on which the appellant's argument in this case was based would, however, seem to be still open unless their Lordships of the Judicial Committee could be held to have definitely decided it also. Restitution is provided for only in connection with the reversal or variation of 'decrees,' and this term would not even now comprehend an order refusing to set aside an execution sale for irregularity, &c. This is appealed against only as an 'order' (see O. 43, R. 1 (*j*) and in case of its reversal, it would be difficult to bring the consequent claim for restitution within the strict letter of the first clause of S. 144. Even in such a case, their Lordships have nevertheless held that the claim for restitution by summary proceedings was "justified by Sections 583 and 244 of the Code." Though they add that "even if the point were doubtful, their Lordships would not be disposed at this stage of the proceedings to permit the expense and delay of a separate suit," it may well be claimed that in the earlier sentence their Lordships have definitely expressed their opinion. The reference in the judgment to S. 244, when read in the light of the argument before the Judicial Committee and of the judgments of the Courts below, would seem to involve (though perhaps only impliedly) a pronouncement by their Lordships on another point also, as to which Courts in India have taken divergent views, *viz.*, whether or not an order under S. 312 can also be held to fall under S. 244, as relating to the discharge or satisfaction of the decree.

Giving the fullest effect to their Lordships' pronouncement, the question would still wear a somewhat different aspect under the new Code. Section 144 is not (like S. 583 of the old Code) merely an *enabling* section, for the second clause of the section expressly prohibits the bringing of a suit for any relief which may be obtained by application under the first clause. In this view, the point may arise whether the second clause of the section should

not be applied only on a strict or literal interpretation of the first clause.

Rashid-un-nissa v. Muhammad Ismail Khan.— I. L. R. 31 A. 572 (P. C.)—Under S. 457 of the Code of 1882 there was a difference of opinion between the Madras and Allahabad High Courts as to the effect of proceedings conducted against a minor represented by a 'married woman' as guardian *ad litem*—*Kachayi Kuttiali* v. *Udumpumthala* [1]; *Kundan Lal* v. *Gajadhar Lal*. [2] The Privy Council have now affirmed the Allahabad view that such representation is no representation in law and that the proceedings are, therefore, not merely irregular but wholly void and inoperative as against the minor. The new Code has not re-enacted this provision of disability of a married woman (O. 32, R. 4); and the particular question is not, therefore, of much interest in the future. But the decision under notice will still be applicable in the other case of disqualification, namely, adverseness of interest as between the minor and the person appointed his guardian. Their Lordships also lay down the principle that the provisions of the Code as to guardians *ad litem* are not affected by the provisions of the Guardians and Wards Act.

CRITICAL NOTE.

Adoption of a Married Person as affecting the Status of his Children born before the Adoption.

(Kalgavda Javanappa *v.* Somappa Jamangavda.) [I. L. R. 33 B. 669.]

The question raised in this case has no chance of arising for consideration elsewhere than in Bombay; for all the other High Courts have held that under the Hindu Law a married person cannot be adopted even among Sudras, and that, whether he is of the same gotra with the adopter or of a different gotra. As a matter of *custom*, the Allahabad High Court has, no doubt, in a recent case, recognised the validity of the adoption of a married person among Jains—*Manohar Lal* v. *Banarsi Das*[3]—and if, in a case like that, the question considered by the Bombay Judges, namely, that of the status of a son of the adoptee born before the date of adoption, should arise, it may well be decided as a matter of custom rather than as an abstract question of Hindu Law. The elaborate judgment of

1. (1906) I. L. R. 29. M. 58. 2. (1907) I. L. R. 29 A. 728.
3. (1907) I.L.R. 29 A. 495.

the Bombay High Court, however, raises several points of interest and, even as a theoretical question, the matter is well worth investigation.

As an eminent authority on Hindu Law, the learned Acting Chief Justice of the Bombay High Court rightly protests against the prevalent fashion of "doing scant justice to Hindu Law as a science;" but we venture to think that it could not have been the intention of the learned Judge generally to condemn all resort to analogies from foreign laws. One must, no doubt, be particularly careful, before applying foreign analogies, especially in matters of *personal* law, to see that the analogy is true and complete. In the present case, it is submitted, the lower Court would have arrived at the same conclusion as the High Court if only it had taken more care to find out the analogy it required in the Roman Law. The system of adoption in the early Roman law is so closely similar to that among the Hindus and the underlying principles in the two are so alike that, if carefully applied, the analogy of the Roman Law is hardly ever likely to be misleading in such cases; and, with due deference to the learned Judge, it must be said that the *law* of adoption is so little developed by the Hindu Text Writers themselves that a self-denying ordinance shutting out all aid derivable from a highly developed system of law like that of Rome, cannot but be regretted. The principle laid down by the Judicial Committee in *Bhyab Ram Singh* v. *Bhyab Ugar Singh*[1] that "the Hindu Law contains in itself the principles of its own exposition * * (and) nothing from any foreign source should be introduced into it" is, as would appear from the context, properly applicable only to questions of *interpretation.* If, in the Bombay case, the Subordinate Judge had taken note of the distinction in the Roman Law between *adoption* (properly so called) and *adrogation*, he would have found that the analogy in respect of the question before him should be drawn from the law relating to adoption and not that relating to adrogation. It is only in the latter case that a son of the adoptee, born before the date of the adoption, passes into the family of the adopter because the child is under the *potestas* of the adoptee who is himself *sui juris.* The texts of the Roman Law expressly provide that in the case of *adoptio*, children born or conceived before the date of adoption remain in the natural family of the adoptee (see Institutes I. xii. 9 and Mackeldey's RomanLaw, S.597, Footnote 2). The adrogation of the Roman Law would correspond rather to

1. (1870) 13 M.I.A. at p.390.

the *Swayamdatta* of the Hindu Law (now obsolete: see *Bashetiappa* v. *Shivalingappa*[1] and *Pappamma* v. *Appa Rao*[2]) for, in that case there was no gift (*datio*) in adoption. Of course in the Roman Law of adoption the theory of *patria potestas* was a dominant factor, and that explains, for instance, the fact that under it a grandfather or an adoptive father could give away a grandson or an adopted son. But adoption in the early Roman Law was also closely connected with the institution of family *sacra*, and on this account there are many interesting points of similarity between the Hindu and the early Roman Law of Adoption. The adoptee is regarded in both the systems as a member of the agnatic group of the adopting family, while both alike, in laying down the prohibited degrees of relationship for marriage, regard his cognatic relationship with the natural family as continuing.

Coming now to the reasoning on which the learned Judges of the Bombay High Court base their conclusion, it is submitted that the argument based on the adoptee's child having acquired a vested interest in the properties of the natural family cannot be regarded as conclusive; for no such point can arise with reference to a *Dayabhaga* family, and the question of the *status* of the adoptee's child should be decided as one of general Hindu Law and not with reference to the *Mitakshara* theory of *property*. Assuming that the child has an *indefeasible* right to a share of the family property, the question would still remain whether or not he ceases to be a member of the family, say for instance for purposes of collateral inheritance. His passing into a new family is not inconsistent with his retaining rights already acquired by him. (Cf. *Behari Lal* v. *Kailas Chunder*[3] and *Venkatanarasimha Appa Rao* v. *Rangayyappa Rao*[4].

The question of the *gotra* of such child (after the adoption of the father) is not easy to decide. NILAKANTHA seems to be the only commentator who expressly refers to the possibility of a person being adopted even after he has been married and has male issue; and it is very doubtful whether even he meant it as a matter of strict Hindu law or as a thing sanctioned by custom. The Hindu law books nowhere else *expressly* contemplate such an adoption, and there is no discussion anywhere as to the effect of the adoption on the status of the pre-existing issue of the adoptee. *Prima facie*, in the case of a male, it is his birth that

1. (1873) 10 B.H.C.R. 268. 2. (1892) I.L.R. 16 M. at p. 393.
3. (1896) I. C.W.N. 121. 4. (1905) I.L.R. 29 M. at pp. 447 to 452.

determines his gotra, and it is certainly difficult to squeeze anything (on this question) out of the text of MANU (Ch. IX, 142) which deals with the gotra of the adoptee himself. But the gotra of the wife is settled by her marriage, and if, as seems to be assumed, her gotra is, even in the absence of any express authority, changed by the adoption of her husband, it does not seem unreasonable to ask why the same principle should not hold good in the case of the son also. No question of 'property' in the wife or in the son need be raised, and as for the argument of the 'identity' (in the eyes of the Shastras) of husband and wife, would it not suffice to point out in answer that the gotra of the wife is rested not on this identity but on the fact of her 'entry' into the husband's family ? The position is, to say the least, anomalous, and no argument on general principle can afford a satisfactory solution.

So far, however, as rights of inheritance are concerned, the *Mitakshara* bases them primarily on consanguinity and the *Dayabhaga* on spiritual benefit. The question of *gotra* is here of but indirect importance. Under the Mitakshara a person inherits the property of another because he is related by *birth* to the other. What is the effect of an adoption? The tie of blood could not be obliterated or artificially created. (*Dat. Mim.* VI, S. 10, &c). It requires the authority of a special text to cut away rights of inheritance in the family of birth (*Manu* IX, 142) and of another text (*Manu* IX, 141, 158, &c.) to create rights of inheritance in the adoptive family. If, then, it should be assumed that the preborn issue of the adoptee somehow pass into the adopting family, several anomalies would arise in the law of inheritance, unless the above texts could be interpreted as applying to such issue also. In spite of their having passed into the adopting family, such issue could otherwise claim to be heirs (except perhaps as *sagotra* sapindas) to the members of the natural family. On the other hand, in the view that such issue remain in the family of their birth, difficult questions may arise with reference to their right to perform *shraddhas* and inherit on that basis. On this point some of the observations in the case under notice seem to us to be not altogether beyond doubt.

Thus, one of the arguments advanced on behalf of the respondent was that when the person is given away in adoption, the relationship (of grandfather and grandson) between the natural father of the adoptee and the issue of the latter born before the adoption would also cease. The learned Judges answer this by

saying that the relation between the grandfather and the grandson, though arising through the father, afterwards becomes independent of the relation between the father and the grandfather. "When the relationship has once been brought about by birth," they say, "the grandson becomes an entity by himself, and the continuance of that relation does not depend on the continuance of the father's relation to the grandfather." There is an interesting discussion of a somewhat analogous question by JAGANNATHA, and his reasoning would seem to suggest some doubt as to the soundness of the principle enunciated in the above quotation. Dealing first with the relationship of the adoptee to the ancestors of his natural mother, the author of the Digest observes as follows:—

"By the father's relinquishment his funeral rites and the son's claim to his estate and family are annulled; by the mother's relinquishment also, the son's claim to her estate and family is annulled; but the father of the natural mother not having relinquished the child, how can the boy's claim to perform his *shraddha* and take his inheritance be annulled? The *shraddha* for a maternal ancestor is not the consequence of his 'property', for he has no property in his daughter's son; it is grounded on the birth of the child from a daughter procreated by him, and that descent is not in this case lost." *

Lower down, the author puts to himself the question: "Shall he not take the inheritance and perform the obsequies of the natural father of his natural father" on the ground that a grandson may be defined as one 'born from a son.' No, he answers. "One born from a son is not the meaning of grandson in the male line'; but son's son is the meaning of that term." (COLEBR. *Dig.*, Bk. V., Ch. iv Sec. 8 Title CCLXXIII, Notes). As would appear from the context, the implication in the above passage is that though by *birth* a grandson of the grandfather, the person who is *himself* given away by his father ceases to be grandson as well, because he is *no longer* the son's son. By parity of reasoning could it not be said that a grandfather means a father's father and when he severs that relationship (by giving away his son in adoption) he ceases to be grandfather as well, the *grandfathership* (so to speak) depending on the continuance of his *fathership*?

Another argument advanced before the learned Judges was, assuming that the relationship of grandfather and grandson

* This view is, of course, not now accepted (see *Dat Mim* VI, 50-53; MAYNE'S *Hindu Law* para, 166.)

continued, the grandson could not perform the grandfather's *shraddhas*, because he could not perform his own father's or inherit the latter's property. We are not sure that the one necessarily follows from the other, but the learned Judges answer the argument in another way, *i.e.*, by holding that there is nothing to show that the grandson cannot perform his father's ceremony because the latter has entered another family or even a different *gotra* by adoption. This view would, however, seem to be inconsistent with the text of MANU (IX, 142) as interpreted by the learned Judges themselves in an earlier part of their judgment, *i. e.*, that on the adoption, the adoptee ceases to have connection with both the (ascending and descending) lines in the natural family. Mr. GOLAP CHANDRA SARKAR takes the word *gotra* in the first foot of this verse to mean the 'status of sonship' (*Hindu Law*, 3rd. Edition, pp. 117 and 157) and on this footing it may be contended that the adoptee only ceases to be the 'son of his father' and does not cease to be the 'father of his own son' (assuming the latter to be left behind in the natural family). But the third foot of the verse (गोत्ररिक्थानुगः पिण्डः) would seem to be intended to lay down a general rule. It is true that it is not always necessary that a person performing obsequies should be of the same *gotra* as the deceased, and it may also sometimes happen that one person has to perform the obsequies while the inheritance goes to another. But in deciding the extent of the forfeiture (of *gotra* and *riktha*) consequent on an adoption, the general principle stated in the text of MANU should be given its due effect. On this point, the observations quoted by JAGANNATHA (from *Vachaspati Bhattacharya*) may well be referred to. "If the right be dubious, and there be no other argument deducible from precept, it is thus suggested, that the funeral cake shall not be offered unless the party can claim either the family or the estate * * * If there be a positive ordinance, the funeral cake may be offered to a stranger without taking his inheritence." (COLEBR., *Dig.* Book V, Ch. IV, Title CCLXXVI, Notes).

In conclusion, we must say, one cannot help feeling the inconsistency—not to say 'ludicrousness'—of resorting to these subtleties of Hindu ritual and theories of spiritual benefit in laying down a rule of law for Jains—a community that does not in the least profess to follow or believe in them.

SUMMARY OF ENGLISH CASES.

Betts *v.* Stevens. [1910] 1 K. B. 1.

Motor car—Driving at illegal speed—Warning by defendant of the existence of police trap for detection—Liability of defendant—Wilful obstruction of constable in his duty.

While a motor car was going at an unauthorized speed the defendant warned the driver of the existence ahead of machines and constables for detecting the crime, whereupon the driver slackened the speed with the result that the constables were not able to detect the crime. *Held* that the defendant was guilty of wilfully obstructing the constable in his duty.

Per Curiam—(*a*) It will be different if such warning be given to the car while it is not actually going at an illegal speed. (*b*) It is impossible to say that, because the statute does not expressly say that the policeman may use the particular means for obtaining the required evidence that he does use, therefore it is not his duty to obtain it by those means.

Harrison *v.* Harrison. [1910] 1 K.B. 35.

Contract—Previous order for separation and weekly payments—Contract to live together and pay wife £150 if she be ill-treated—Covenant by wife to abstain from further legal proceedings on payment of £ 150—Ill-treatment—Suit for £150—Maintainability.

The plaintiff, who was the defendant's wife and who had obtained an order from Justices for separation and for weekly payments from her husband on account of his ill-treatment, began to live with him again as requested by him, the husband contracting to pay her £ 150 in case he ill-treated her after re-union. The wife on her part covenanted that in case of payment of £ 150 she would not take further proceedings for separation and weekly payments. The husband having ill-treated her again: *Held*, in a suit by the wife for £ 150, that the contract to pay it was not void or against public policy in the sense that it was made in view of a possible future separation, the separation here contemplated being one to be made by Justices.

Per Curiam—The plaintiff also was bound by her convenant not to demand weekly payments in case of payment of £ 150.

Baker *v.* Courage & Co. [1910] 1 K.B. 56.

Limitation—Money paid under a mistake of fact—No demand necessary prior to suit.

Limitation for a suit to recover money paid under a mistake of fact begins to run from the date of payment and not from the date of discovery of the mistake as in a case of fraud. The question whether money paid under a mistake of fact can be recovered depends upon the state of mind of the plaintiff at the time of payment, just as in an action of deceit the liability of the defendant depends upon his state of mind at the time of making the statement. No demand and refusal is necessary before a suit to recover money, which was paid and received under mutual mistake, can be laid, for, if so, the plaintiff can, in order to suit his convenience, indefinitely postpone notification of his discovery of the mistake and the making of his demand. It is a case of money had and received.

In re **Nash—Cook** *v.* **Frederick.** [1910] 1 Ch 1.

Equitable estates—Rule against double possibilities—Election.

The rule against limiting land to an unborn child applies to equitable as well as to legal estates. The phrase "possibility upon a possibility" is open to exception and ought not to be used. The reason suggested in the phrase as the basis for the rule is no doubt fantastic, but the rule itself, being a well-established one, ought to be given effect to.

Persons who take owing to the invalidity of an appointment by reason of this rule are not put to their election because they take, under the same will by which the appointment was made, some other property of the appointor.

South Eastern Ry. *v.* **Associated Portland Cement Manufactures, Ld.** [1910] 1 Ch. 12 (C. A.)

Rule against perpetuities—Applicability to contracts—Uncertainty—Reservation or exception.

A Railway Company acquired a certain strip of land for their railway on terms that they were to make a level-crossing for the accommodation of the owner and also that the owner was to have the right to make a tunnel underneath the railway. After having constructed the railway, the Company sought to repudiate the liability to allow the tunnel to be constructed, saying that the provision was too uncertain and indefinite to be binding, and, secondly, that it was void on the ground of perpetuity.

Held: that it was neither, and that the Railway Company was bound by its undertaking.

Swinfen Eady J. considered that, under the agreement, an easement of tunnelling was reserved in favour of the owner at a spot to be selected by him and no question arose of a reservation or exception to come into operation at a future time. There was nothing uncertain about it and, being a grant *in præsenti*, the rule against perpetuities had no application. Any way, there was a personal undertaking by the Company, and to a personal undertaking, the rule against perpetuities had no application.

The Court of Appeal dismissed the appeal on the simple ground that here there was a personal undertaking and the rule against perpetuities did not apply to personal covenants. Referring to the purely legal arguments in the case, wholly unmeritorious, observed *Fletcher Moulton* L. J., "if they were right in law, the fact that I am thoroughly disgusted with the Railway Company for putting forward such a claim would not affect me in the slighest. The importance of making English law clear and certain is so immeasurably greater than any other consideration—it is the one thing that we are here to do—that I should have decided in their favour if they were, in my opinion, right in law."

Attorney-General *v.* Birmingham Tame & Rea District Drainage Board.

[1910] 1 Ch. 48 (C. A).

Attorney-General—Injunction against public body for breach of statute—Not matter of right—Powers of the Appellate Court.

It is not the law that the Attorney-General is entitled, as a matter of right, to say: "In all circumstances, if I prove a breach of the statuate (by a public body) the Court is bound to grant an injunction, whether it be an injunction against continuing to do something, or whether it be in the form of a mandatory injunction." Even in such cases, the matter is wholly in the discretion of the Court.

In a case, where an injunction had been granted against a public body against discharging sewage water into a river in contravention of the provisions of the Public Health Act, and it appeared that, after decree and pending the appeal, the defendant body had undertaken and completed works so as to render their action no longer a breach of the Act, their Lordships discharged the injunction, having regard to the honest efforts made by the public body to perform its duties and the successful attainment of its

object. Though the procedure was novel, their Lordships considered they had the power, sitting as Appellate Court, to discharge the order.

Attorney-General *v.* Belgrave Hospital. [1910] 1 Ch. 73.

Construction— Will— Charity—"To the Belgrave Hospital to found a bed."

The words "to the Belgrave Hospital for children to found a bed to be called the 'Eleanor Bed,' £1,000" in a will do not justify the Hospital in using the amount for their current expenses. Evidence is not admissible to show that the testator knew the needs of the hospital and must, having regard to a certain conversation, really have intended the fund to be applied as annual income. The proper course is to invest the amount and apply the income, so far as it will extend, to the maintenance of a bed to be called the Eleanor Bed, though it would be sufficient compliance if some bed already existing in the hospital is appropriated for this purpose and the bed named "Eleanor Bed."

Wille *v.* St. John. [1910] 1 Ch. 84.

Restrictive conditons, who can enforce.

A purchaser of a small plot of land forming part of a larger plot conveyed as a whole to his vendor cannot, in the absence of a building scheme, enforce the restrictive conditions applied by the previous vendor to the big plot as a whole against the purchaser of another portion of the big plot.

Jones *v.* Great Central Railway. [1910] A. C. 4. (H. L.)

Practice—Discovery—Privilege between Solicitor and Client.

A member of a Trade Union who had been dismissed by his employers furnished the Union authorities, as required by the rules, with information in writing to enable the authorities to decide whether he was entitled to bring an action of wrongful dismissal at the expense of the Union and with the assistance of their solicitor. The information comprised the evidence available in support of the action and the names of the witnesses. The Union authorities sanctioned an action brought by the member, with their solicitor acting as solicitor for the plaintiff. Upon a summons for discovery taken out by the defendants :

Held, that the letters containing the information did not fall within the established rule as to the privilege between solicitor and client and must be produced.

Winstanley v. North Manchester Overseers.

[1910] A. C. 7 (H. L.)

Poor Rate—Profit derived from Burial Ground—Exemption from assessment.

The Rector of a Parish has a beneficial occupation of a Parish Cemetery and is liable to be rated on the profit accruing to him from burial and other fees, such profit being incidental to his occupation, not to his office.

E. Hutton & Co. v. Jones. [1910] A. C. 20 (H. L.)

Defamation—Libel in newspaper—Intention to defame plaintiff.

In an action for libel it is no defence to show that the defendant did not intend to defame the plaintiff, if reasonable people would think the language to be defamatory of the plaintiff.

Per *Lord Loreburn*, L. C.—" Libel is a tortious act. What does the tort consist in ? It consists in using language which others knowing the circumstances would reasonably think to be defamatory of the person complaining of and injured by it. A person charged with libel cannot defend himself by showing that he intended in his own breast not to defame the plaintiff, if in fact he did both. He has none the less imputed something disgraceful and has none the less injured the plaintiff. A man in good faith may publish a libel believing it to be true, and it may be found by the Jury that he acted in good faith believing it to be true, but that in fact that statement was false. Under those circumstances he has no defence to the action, however excellent his intention. If the intention of the writer be immaterial in considering whether the matter written is defamatory, I do not see why it need be relevant in considering whether it is defamatory of the plaintiff. The writing, according to the old form, must be malicious, and it must be of and concerning the plaintiff. Just as the defendant could not excuse himself from malice by proving that he wrote it in the most benevolent spirit, so he cannot show that the libel was not of and concerning the plaintiff by proving that he never heard of the plaintiff. His intention in

both respects equally is inferred from what he did. His remedy is to abstain from defamatory words."

Winans v. Attorney-General. [1910] A. C. 27 (H. L.)

Estate Duty—Foreign Bonds payable to Bearer—Bonds physically situate in the United Kingdom—Finance Act, 1894.

Foreign bonds and certificates payable to bearer, passing by delivery and marketable on the London Stock Exchange are, when physically situate in the United Kingdom at the death of the owner, liable to Estate Duty under the Finance Act, 1894.

The principle that domicil governs the liability to *legacy and succession duties* has, as to personalty within the jurisdiction, no concern with the *Estate Duty*. Legacy and succession duties fall upon the benefits received by surrivors on their accession upon a death. Estate duty falls upon the property passing upon a death, quite irrespective of its destination.

Attorney-General v. Till. [1910] A. C. 50 (H. L.)

Income Tax Act, 1842, *Ss.* 52, 55—*Return of Profits under Schedule D—Neglect to deliver " a true and correct statement."*

T, being required by S. 52 of the Income Tax Act, 1842, to deliver "a true and correct statement in writing" of his gains and profits under Schedule D, delivered an incorrect statement, not fraudulently, but (as the Jury found) negligently, that is to say, not to the best of his judgment and belief according to the rules:

Held, that the penalty imposed by S. 55 of the Act for neglecting "to deliver any statement as aforesaid" is not limited to cases of non-delivery of statements but applies to cases of delivery of incorrect statements as well.

Britannic Merthyr Coal Co. v. David.

[1910] A. C. 74. (H. L.)

Master and Servant—Negligence—Burden of proof—Statutory Duty—Coal Mines Regulation Acts 1887 and 1896.

An explosion in a mine was caused by a blasting operation (technically called a *shot*) conducted in breach of the rules of the Coal Mines Regulation Acts. In an action against the mine-owners for damages in respect of injury to a miner by the explosion, the trial Judge held that the onus lay on the plaintiff of

making out that the mine-owners had neglected their duty to enforce the Statutory Rules:

Held, by the House of Lords, that the burden of proof did not lie upon the plaintiff.

Coldrick *v.* Partridge, Jones & Co., Ltd.

[1910] A. C. 77 (H. L.)

Master and Servant—Common employment—Negligence of fellow-servants—Implied term of contract of service.

Certain colliery proprietors, who possessed a railway in connection with the colliery, ran a train thereon for the carriage of their colliers, free of charge, from the colliery towards their homes after the day's work. One of the colliers, while being so carried, met his death through an accident occasioned by the negligence of servants of his employers engaged in the repair of a bridge over the railway:

Held, that the deceased must, as between himself and his employers, be deemed to have undertaken the risk of such an accident, and that an action could not be maintained against the employers.

Per *Lord Loreburn*, L. C.—"It is impossible in every case of this kind not to wish that compensation should in some way or other be made payable to those who have suffered by the accident, but we have no right to stretch the law for any such humane purpose at the expense of other people."

Great Western Railway Co. *v.* Carpalla United China Clay Co., Ltd. [1910] A. C. 83 (H. L.)

China clay—Mineral—Railways Clauses Consolidation Act, 1845, *Ss.* 77, 78.

China clay was not part of the ordinary composition of the soil in Cornwall, and was, therefore, a mineral within the provisions of the Railways Clauses Consolidation Act, 1845.

Compare *North British Railway Co.* v. *Budhill Coal & Sandstone Co.*[1], *infra.*

1. (1910) A. C. 116.

Amalgamated Society of Railway Servants *v.* Osborne. [1910] A. C. 87 (H. L.)

Trade Union—Rules—Parliamentary representation—Ultra vires—Public policy—Trade Union Acts 1871 *and* 1876.

Plaintiff as a member of a Trade Union sued the Union (1) for a declaration that a certain rule of the Union which provided, among other things, for Parliamentary representation and the enforced levy of contributions from the Members towards the payment of salaries or maintenance allowance to Members of Parliament pledged to observe and fulfil the conditions imposed by the constitution of the Labour Party is *ultra vires* and void, and (2) for an injunction restraining the Union from enforcing the said rule. The defendant contended *inter alia* that a Trade Union was at liberty to expend its funds to produce the return of Members of Parliament and to maintain them there as freely as an individual, and that accordingly a rule which conferred on the Union the power to levy contributions from members for that purpose was valid :

Held, that the rule was *ultra vires* and illegal and that the plaintiff was entitled to the declaration and injunction sought for.

Per *Lord Macnaghten*—" It can hardly be contended that a political organization is not a thing very different from a combination for trade purposes. There is nothing in any of the Trade Union Acts from which it can be reasonably inferred that Trade Unions, as defined by Parliament, were ever meant to have the power of collecting and administering funds for political purposes * * * I am, therefore, of opinion that a rule which purports to confer such a power as that now in question on any Trade Union registered under the Act of 1871, whether it be an original rule of the Union or a rule subsequently introduced by amendment, must be *ultra vires* and illegal."

Similar views were expressed by the *Earl of Halsbury* and *Lord Atkinson.*

Per *Lord James of Hereford.*—"With much of the argument adopted by Counsel at the Bar on behalf of the appellants (Union) I agree * * * But my difficulty in the way of complete concurrence arises in consequence of the term (in the rule) : ' All candidates shall sign and accept the conditions of the Labour Party and be subject to their whip.' The effect of this rule is that a member of the Trade Union is compelled to contribute to

the support of a Member of Parliament who is compelled 'to answer the whip of the Labour Party.' I construe this condition as meaning that the Member undertakes to forego his own judgment and to vote in Parliament in accordance with the opinion of some person or persons acting on behalf of the Labour Party. And such vote would have to be given in respect of all matters, including those of a most general character, such as confidence in a Ministry or the policy of a Budget—matters unconnected directly at least with the interests of labour. Therefore I am of opinion that the application of money to the maintenance of a Member whose action is so regulated is not within the powers of a Trade Union."

Lord Shaw of Dunfermline decided against the Union on the broad constitutional ground that some of the rules of the Union, including the rule sought to be impeached, was fundamentally illegal as being in violation of that sound public policy which is essential to the working of Representative Government.

North British Railway Co. *v.* Budhill Coal and Sandstone Co. [1910] A. C. 116 (H. L.)

Sandstone—Mineral—Railways Clauses Consolidation (Scotland) Act, 1845, *Ss.* 70, 71.

Sandstone, where it is the ordinary rock of the district, is not a "mineral" within the exception in S. 70 of the Railways Clauses Consolidation (Scotland) Act, 1845.

Edinburgh Life Assurance Co. *v.* Lord-Advocate. [1910] A. C. 143 (H.L.)

Income Tax—Sale of Annuities—Assessment on Revenue from Invested Funds—Customs and Inland Revenue Act, 1888, *S.* 24, *Sub-S.* 3—*Income Tax Act*, 1842, *Schedule D*, *S.* 102.

An Insurance Company, in consideration of certain money payments, granted annuities which were charged on the whole funds of the Company. The Company had a large income from invested capital from which incom tax was deducted at the source, and the amount so paid was larger than if the Company had been assessed on profits under Schedule D. The income from invested capital was much larger than the sum paid each year as annuities. The Company also had an income from premiums, &c., not taxed at the source. No particular fund was set

apart, ear-marked, or specially charged in the books of the Company with the payment of the annuities. In paying the annuities the Company deducted the amount of the income-tax due in respect thereof and retained the amount of the tax so deducted.

Held, that the Company was entitled to retain the amount of the tax so deducted inasmuch as where annuities such as those payable by the Company are charged upon a tax-bearing fund amply sufficient to pay them in full though not set apart for that purpose, they cannot be held to be "not payable" or "not wholly payable" out of profits or gains brought into charge within the meaing of S. 24, Sub-Section 3, of the Customs and Inland Revenue Act, 1888.

Russo-Chinese Bank *v.* Li Yau Sam.[1910] A.C.174 (P.C.)

Principal and Agent—Action against Principal to recover money improperly received by Agent.

If an agent be held out as having only a limited authority to do acts of a particular class on behalf of his principal, the princi pal is not bound by an act done outside that authority, even if it be an act of the particular class. Therefore, where an agent was only authorised to arrange the details of negotiations to be submited to his principal for approval, but had no authority to receive money until those details had been submitted and approved :

Held, that the principal was not liable to refund money received by the agent before the principal had approved the negotiation, and misappropriated by him.

Williams *v.* O'Keefe. [1910] A. C. 186 (P. C.)

New South Wales Crown Lands Acts—Agreement by the Crown with Licensee of Land—Jurisdiction of Land Appeal Court.

An agreement by the Government that in consideration of a licensee of land paying license fees as demanded (which had been refused because of a dispute as to a new appraisement) a notification to the effect that the licenses had not been renewed owing to non-payment thereof should be revoked and that the licensee should quietly enjoy his holding is not *ultra vires* of the Crown as being contrary to the New South Wales Crown Lands Acts ; and on breach thereof by the Government an action will lie.

Held, also, that the Land Appeal Court had no jurisdiction to determine the status of such land and to decide that the said land was not held by the licensee under the agreement, but was available for annual leases.

Kelly v. Hart. [1910] A. C. 192 (P. C.)

New South Wales Police Offences Act, 1901, *S.* 61.—*Sunday Trading at Railway Refreshment Rooms—Actual or Intending Passengers—Onus of Proof.*

By the Police Offences Act, 1901, S. 61, any person keeping open any shop for the purpose of trading on Sunday is made liable to a penalty. The respondent was the lessee of railway refreshment rooms, and by the terms of his lease was bound to keep the rooms open at all times required by the Commissioners, and to supply refreshments to all persons arriving or departing by train at any time during the day or night. The Commissioners required the rooms to be kept open on Sundays, and on a Sunday the respondent sold refreshments.

Held, that the onus was upon the respondent to show that the persons to whom he so sold refreshments were actual or intending passengers by train, and that, in the absence of such evidence, he was liable to a penalty under the Act.

JOTTINGS AND CUTTINGS.

Defamation by Disparagement.—The old and inaccurate description of defamation actions relating to land or goods as for "slander of title" was definitely replaced by the new terminology "disparagement of property" after the considered judgment of the House of Lords in *White* v. *Mellin* (1895), where disparagement in law was distinguished from mere depreciation. Mr. Spencer Bower, in his Code, has lately improved on this nomenclature by including under the heading "Quasi-Defamation", this and a number of other causes of action which are not strictly defamation actions at all, the practical reason for this being that they are all treated as if they were ordinary libel actions and have the same generic character of being dealt with mainly on the same principles as such actions. There are, however, distinctions between the different kinds of quasi-defamatory actions, and they may in fact be regarded as representing a descending scale, each successive species being further removed from defamation proper, and more of the various elements not present in an ordinary proceeding for defamation having to be established by the person aggrieved in order to show a cause of action. Thus in actions against bankers for quasi-defamation by dishonouring a customer's cheque for alleged want of funds, the plaintiff need only prove the falsity of this statement; in indirect

defamation—(*i.e.*) defamation causing damage to a person other than the party defamed—he need not show falsity but must prove malice and actual damage ; in cases of malicious publication of false non-defamatory matter he must establish all three elements ; and in actions relating to property he must show in addition " legal disparagement ." It is only during the last half-century that the latter form of action has been applied to all kinds of proprietary interests, including the circulation of a newspaper or the right to any part of its contents, but the essential conditions of protection have remained the same as in the old action for " slander of title," which was originally confined to lands. Thus in *Dick* v. *Brooks* (1880), where the defendant improperly issued circulars affecting the plaintiff's right to publish in his magazine a pattern for wool-work of Millais picture "The Huguenot" there being no evidence of actual damage, the action was dismissed ; and in *Lyne* v. *Nicholls* (1906), where the defendant was found to have maliciously printed false statements of fact as to the circulation of the plaintiff's paper, but there was the same absence of proof of actual damage, the application for an injunction was refused, damage being an essential ingredient in the cause of action. A similar result followed last week in the action of *The Publishers of the " Observer "* v. *The Advertisers' Protection Society* (*Lim.*), where, after a lengthy trial before Mr. Justice Darling and a Special Jury, the jury found (*a*) that the defendants had published a disparaging statement of the plaintiffs' business ; (*b*) that it was false ; (*c*) that it was not malicious in the sense of being designed to injure the plaintiffs in their business—a non-essential matter after Baron Pollock's judgment in *The Western Manure Company* v. *Lawes* (1864);(*d*) that it was malicious in the sense of being without just cause or excuse, and (*e*) that it did not cause injury to the plaintiffs either necessarily or in fact, so that there was no damage. On these findings judgment was entered for the defendants, and this seems to be in accordance with the whole trend of the authorities, which have always insisted on actual damage as a necessary ingredient in this very specialised from of action. The plaintiffs had a legitimate grievance against the defendants, which they have now publicly established, but it was not a grievance which the law recognises—it was *injuria* without *damnum*—and the action being wanting in one of its essentials necessarily failed.—*Law Journal.*

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Rescission of Contract in Bankruptcy.—If the fame of Miss Charlesworth as an adventuress is likely to be short-lived, she

is assured of a certain place in legal annals as the defendant in a reported decision of great general interest. The First Division of the Scottish Court of Session gave an important judgment at the end of last year in one of the actions which arose out of her bold and singularly successful attempts to get goods from large tradesmen on the strength of fine promises—*A. W. Gamage (Lim.)* v. *Charlesworth.* The plaintiffs claimed to recover from Violet Charlesworth's trustee in bankruptcy certain valuable goods which, they said, were fraudulently obtained by her, on the ground that they had brought the action to rescind the contract for the sale of the goods before the bankruptcy occurred and as soon as they discovered the fraudulent pretence. In an English case which was cited to the Court—*Eastgate* v. *Ward* (1905)—Mr. Justice *Bigham* held that where a sale of goods has been induced by the fraud of the purchaser, the vendor, on discovering the fraud, is entitled within a reasonable time to disaffirm the sale and retake possession of his goods, even after an act of bankruptcy by the purchaser. The trustee in bankruptcy, said the learned Judge, had no better title than the bankrupt, and acquired the interest in the property subject to the right of third parties. But the majority of the Scottish Court did not admit the general applicability of this decision, and, in the special circumstances of the case before them, held that the vendors could not rescind the contract. They had not established that the particular false representation on which they relied—*viz.*, that Miss Charlesworth was coming into a large sum of money—was the inducing cause of the contract. And, as in the case of the repudiation of a contract to take shares, so in the rescission of a contract to sell goods, the vendor must show that the false representation of the other party was the actual cause of the contract—*Attwood* v *Small* (1838). The right to rescind a contract on the ground that it was induced by fraud is an equitable remedy, and the Court must look carefully at any claim by a creditor to goods in the hands of the trustees in bankruptcy, in order that he may not get any undue preference over other victims of the debtor's dishonesty. The main object of bankruptcy proceedings is to see that equal justice may be done in a rough fashion to all creditors. And that object would be defeated if it were open to creditors to repudiate their sales to the bankrupt at the last moment on the ground that they were obtained by fraud, unless they both clearly prove that the sale was induced by a particular false pretence and take immediate steps to avoid the contract.—*Law Journal.*

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Banker's Liability for Mispayment of Cheques.—CLEMENT F. ROBINSON, Portland, Maine, discussing the liability of Banks to their depositors for mispayment of cheques comes to the following conclusions:—

(*a*) A bank cannot charge its depositor for a forged or altered cheque, or a cheque paid on a forged payee endorsement, unless the depositor himself was negligent in the inception of the cheque, or has so acted as to ratify the payment, but the bank will have a defence for a mispayment, *pro tanto*, in so far as the depositor is negligent, after the mispayment, in discovering and reporting it.

(*b*) If, as between the bank and its depositor, the bank must bear such a mispayment, the drawee bank cannot, by weight of authority, obtain reimbursement from the bank which presented the cheque, when the mispayment was on a forged cheque, unless the prior bank were itself negligent or *mala fide*. It may, however, obtain reimbursement, when not itself negligent, in cases of forged endorsements of payees for the whole amount, and in cases of raised cheque, for the excess amount, when the original bank had complete title to the cheque as far as its transfer could give it, or when it acted as an agent and has not paid over the proceeds at the time of the drawee's demand.

(*c*) A notice by a drawee bank to its depositor, requiring him to notify the bank within a specified reasonable time of errors or mispayments, is probably proper in so far as it may be interpreted as marking out the period of time during which he must avail himself of his legal rights; but is of doubtful force, if it is to be interpreted as throwing upon him the risks which the bank, by the general principles expressed under (*a*), is bound by law to assume.—*Central Law Journal.*

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Gave It Up.—The late Judge Hamlin, former Attorney General of Illinois, was once engaged in the trial of a cause before a Judge who was not inclined to tolerate tardiness on the part of attorneys. When he adjourned Court at noon, he took occasion to impress upon the lawyers that Court would reconvene at 1-30 o'clock exactly. He was almost speechless with rage when Mr. Hamlin walked into the Court-room shortly after 2 o'clock, apparently oblivious of any offence.

"Judge Hamlin," exploded the indignant and outraged Court, "your violation of the instruction of the Court is most

reprehensible. Orders issued from this Bench must be obeyed. What do you suppose the people elected me for?"

"Well, Judge," drawled Hamlin, his eyes twinkling with merriment, "that matter always has been a mystery to me."

Unspotted.—At a dinner attended by the late Governor Johnson, a New York millionaire said, in reference to his taxes:

"I've got a little piece of property that brings me in a fair rental, and the tax gatherers haven't spotted it yet. I don't know whether I ought to tell them or not. What would you do, Governor Johnson?"

The Governor's eyes twinkled. "It's the duty of every man," he said, "to live unspotted. Still if I were you, I'd pay up."—*Washington Star.*

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Taken In.—He was a little German man, and as he boarded the car he had such a happy smile on his face that the smoker on the platform asked:

"Well, Jacob, is this a Happy New Year's for you?"

"She vhas so happy dot maype I bush mysel foop!" was the reply.

"Something good has happened, eh?"

"Dearhest effer. Schmidit and I vhas partners from to-day."

"Let's see? Schmidt is in the ice business, I believe?"

"He vhas."

"And you have been working for him?"

"Shust so."

"And to-day—?"

"Und to-day we was partners. I vhas taken in. Schmidit he handles all der money und I handles all der ice. By golly but I vhas a happy mon!"—*Case and Comment.*

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Can part of a Debt be Assigned?—In *Durham* v. *Robertson*, (1898) 1 Q.B., p. 774, Lord Justice *Chitty* said it appeared to him to be questionable whether an assignment of part of a debt came within Section 27 (6) of the Judicature Act, 1873, as, if it did, the creditor would have power to split up the original single legal cause of action for the debt into as many separate legal causes of action as he liked. In *Hughes* v. *Pump House Hotel Co.* (1902) 2 K. B. 190, Lord Justice *Mathew* expressed a similar doubt. In *Jones* v. *Humphreys*, (1902) 1 K.B. 10, Lord *Alverstone* suggested that an absolute assignment of a definite sum out of

the debt might come within the section. In *Skipper* v. *Holloway* 79 L.J. K.B. 91, Mr. Justice *Darling* has recently decided that there can be a valid assignment of a defined portion of an existing debt, but in *Bowles* v. *Baker*, on the 25th ultimo, Mr. Justice *Bray* has decided just the other way. *Bray* J. says that the section speaks of "any debt or chose in action," and does not mention a part of either, and he is of opinion the words should be construed literally and a second ground for his decision is that the section was not intended to allow the creditor to throw a greater burden on the debtor than already existed. It is time this point was taken to the Court of Appeal.—*The Law Students' Journal.*

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The Humorous Side.—THE HORSE DIDN'T "LOOK" GOOD.—A Scandinavian had a horse that he wished to sell to his friend Pat. Pat viewed the horse and exclaimed: "That horse seems to be all right." The Scandinavian said: "But he does not look good": Pat rejoined by saying: "That horse looks good to me." "Vel he doesn't look good," said the Scandinavian. Pat bought the horse. Next day he returned to the Scandinavian with the horse and said: "The horse you sold me is blind." "Vel," said the Scandinavian, "I told you the horse did not look good."—*Case and Comment.*

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"*Something wrong Somewhere.*"—We lift the following "par" from an American Magazine.—"How far is it between those two towns?" asked the lawyer. "About four miles, as the flow cries," replied the witness. "You mean as the fly crows." "No," put in the Judge, "he means as the cry flows." There was a short silence. The hearing then continued, all parties feeling that there was "something wrong somewhere," but that any further attempt at correction was inadvisable.—*Law Notes.*

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Wit in Bar and Bench.—The papers lately have repeated two old stories, but they are both good and bear repetition. Mr. *Oswald*, K.C., once declared that a certain proposition could not be denied by any reasonable man. "But I deny it," said the Judge. "I said any *reasonable* man my lord," sweetly replied counsel.

It was the late Mr. Justice Day who made one of the most writhing comments counsel ever had to endure. Counsel was discussing "bags" of something, and he meandered on wearisomely about the full bags. "My Lord, some of the bags were full bags and some of them were half bags." And some,' said the Judge, leaning over, "were wind-bags."—*Ibid.*

The Dangers of Bureaucracy.—Within recent years many statutes have been passed which are not entitled to be called statutes. They have been merely skeleton statutes with sections authorising certain acts to be done, but the method and procedure whereby these acts were to be done were left in many cases to be settled by rules to be drawn up by some public department. The danger inherent in this system of legislation by rule is apparent, and has been discussed in legal circles for years past. The rules are drawn up generally by some public department, and its officials naturally take every opportunity which offers to increase their powers and importance. It is unnecessary to cite examples, which are numerous and, no doubt, within the knowledge of our readers.

The success which has been accomplished in the past by the officials of public departments in passing rules has emboldened them to attempt to obtain even greater power. The officials have realised that the Judges have powers to declare a rule to be *ultra vires* owing to the right of a subject to appeal from the decision of a permanent official to the Courts of the country. Some of these appeals to the law have been successful and permanent officials of a department have been forced to acknowledge that they are under the control of the Judges. To oust the jurisdiction of the Court has been the object of their ambition for some time past. Many examples of attempts in this direction could be given ; two flagrant cases will probably suffice: the Small Holdings Act which compels the parties to accept the decision of an arbitrator and forbids the employment of counsel and solicitor except with the leave of the Board of Agriculture ; another illustration is afforded by the well-known but fortunately abortive attempt on the part of the Inland Revenue to deprive an aggrieved income-tax payer of his right to resort to the Courts if dissatisfied with the decision of the Commissioners. It would be easy to multiply examples in this direction, successful and unsuccessful. The public is not fully alive to the danger. The plausible reason adduced for such statutory provisions is the saving of expenses, the desire on the part of a benevolent public department to save the public from falling into the hands of rapacious lawyers. The public is gulled ; abuse of lawyers always appeals to the public. The Government in power—on this point there is little difference between the two great political parties—is greatly led by these permanent officials, and so step by step, year by year, these powers increase until we stand now face to face with a new power; one which threatens to make the man the

master and to dominate all other powers in the State—a power which, having acquired a sure grip will never release its hold and will end by strangling all our hardly won liberties; the power which has proved fatal to the well being of many a nation—Bureaucracy.

Bureaucrats have no personal ends to attain in acquiring these powers, and on this ground the danger may be considered by some fanciful. The desire for power is usually linked with the desire for personal gain. But pride of office is a great incentive. On this point let the reader think of the words of Herbert Spencer: "A comparatively small body of officials coherent, having common interests and acting under central authority, has an immense advantage over an incoherent public which has no settled policy and can be brought to act unitedly only under strong provocation. Hence an organisation of officials, once passing a certain stage of growth, becomes less and less resistible, as we see in the bureaucracies of the Continent."

The cynic may remark that, after all, the money goes to the public, so the evil is not so great; the cynic should remember that it may chance to be his turn to fall into the hands of a department.

The British Constitution is, without doubt, a glorious heritage; but it compares unfavourably with the constitution of the United States on one point. Our forefathers did not apparently foresee that Parliament would ever by inadvertence allow our liberties to be filched from us. Some provision similar to the power given in the States to the Supreme Court of Appeals to decide on the legality of a statute is in these days most desirable. Has Parliament constitutionally the right to seek the protection of the Judges? We fear there can only be one answer. The Constitution is not perfect. The legality of any Act of Parliament depriving a subject of his right of petition to the Crown or his right to sue a department should be decided by a Court of Law.—*Law Notes.*

BOOK REVIEWS.

The Law Relating to Public Officers: By A. W. CHASTER. Published by BUTTERWORTH & CO., London, 1909.—This is a considerable improvement upon the book published in 1886 and embodies both the Common law and Statute law on the subject. The arrangement is all that can be desired and a variety of useful information is to be found. The subject has more than a passing

interest to us in the country, and we trust that the book will be found useful by all classes of the profession.

Civil Procedure Code: By P. B. SHINGUE & S. K. PHADKE.—This is one of the many commentaries on the subject. One feature in this book is that the old sections are also given where necessary, and the change in the Law is noted.

The Indian Case-Law on Ejectment: By LAL MOHUN MUKHOPADHYAYA, B. L. Published by the *Weekly Notes* Office Calcutta. Price, Rs. 4.—A good book on the subject of Ejectment in India is a desideratum, and if the author, instead of merely piling up cases, had taken the trouble to state the principles logically and concisely, he would have made a very useful addition to the Lawyer's Library. The author has, no doubt, divided his subject, but it is difficult to gather what is contained in the several chapters. We hope that in the next edition the author will deal with the subject more logically and scientifically.

The Yearly Practice of the Supreme Court for 1910: In two Volumes: By Messrs. MUIR MACKENZIE, T. WILLES CHITTY and R. E. ROSS. Published by BUTTERWORTH &Co., London. Price 25/—net.—This is an annual publication only possible in England. It deals with the practice of the Supreme Court and is in fact a commentary on the rules and orders of the Supreme Court framed under the Judicature Act. The 1st.volume contains the rules and orders and the commentaries thereon. The 2nd volume contains the Judicature Act and the commentaries thereon and certain other Acts. As a guide to the existing practice of the Supreme Court the work is bound to be useful and serviceable.

The Law of Merchandise Marks : By D. M. KERLY M. A., L.L.B. : Third Edition : By F. G. UNDERHAY, M.A. Published by SWEET & MAXWELL LD. Price Rs. 10.—This is the enlargement in a book form of the subject dealt with in Chapter II of the last edition of Kerly on Trade Marks. In a short introduction the author deals with the unsatisfactory nature of the Common Law as regards trade marks and the necessity for legislation. In Chapter II he deals with the Act, *i.e.*, Merchandise Marks Act, the chapter being more or less a commentary on the Act. Chapter III treats of the Warranty of Trade marks and Trade descriptions dealt with in S. 17 of the Act. The last chapter deals with certain miscellaneous matters. Appendices containing the several merchandise marks, and, the rules and orders and other matters give useful information. The book, we hope, will

be useful to practitioners in this country and to others interested in the subject of merchandise marks.

Strahan's Leading Cases in Equity. By J. ANDREW STRAHAN & W. S. CURTIS. Published by BUTTERWORTH & CO., London. Price 15.—The object of this work is to introduce to students the study of Law Reports. For effecting this object the author selects the more modern cases on Equity. The mere dry study of the principles dissociated from the facts of the cases laying them down does not enable the students to have any mastery over the principles, and we think the book will really help the students in the proper study of the Law.

Testamentary Succession : By G. S. HENDERSON, M. A. Third Edition :By ALEX. KINNEY. Published by THACKER SPINK & CO. Calcutta, 1909. Price Rs. 17.—This is a third edition of Henderson's Treatise on the Law of Succession by Alexander Kinney. This is more or less a commentary on the Indian Succession Act, the Hindu Wills Act, the Administrator General's Act, the Probate and Administration Act, the Succession Certificate Act, etc. The cases which have appeared since the publication of the last edition have been incorporated, but the cases within the last three-years have not been referred to. On the whole, however, we think the book preserves the reputation of the previous edition and will be found useful to practitioners in this country.

The Principles of the General Law of Mortgages : By T. A. STRAHAN. Published by SWEET & MAXWELL, LTD., London. Price 7*s*. 6*d*.—This is a students' book on the Law of Mortgages and states the principles relating to the subject succintly. As an elementary text book on the Law of Mortgages it will be a useful guide to students.

Institutes of the Laws of Ceylon, No. 3. *Criminal Law and Procedure*: By K. BALASINGAM. Published by S. RAGUNATH & CO., Jaffna, Ceylon.—In this volume Mr. Balasingam gives a spark of the Institutes of the Laws of Ceylon which he publishes as a series the Criminal Law and Procedure in Ceylon. A perusal of the book will show that there is a close similarity between the Indian Penal Code and the Criminal Law of Ceylon and between our Criminal Procedure Code and the Criminal Procedure Code of Ceylon. On going through the Chapter on Offences against the State we find the offence of sedition which has come into so much prominence within the last decade or so in India, is punishable only with

imprisonment for two years and fine, or fine. According to the Indian Penal Code the punishment awarded is transportation for life. The author has given brief reference to some of the more important decisions in order to increase the usefulness of his book both to the student and the practitioner. We trust the book will be found interesting as a comparative study.

Acknowledgments.

We beg to acknowledge receipt of the following publications :—

1. Annual Digest for 1909: By Mews. Published by Sweet and Maxwell, Ltd., London. Price 15*s.*

2. Index of Patent Designs and Trade Marks from 1884 to 1909 : By S. G. Pirani. Published by Sweet and Maxwell, Ltd., London. Price 21*s.*

3. Simonson on the Reconstruction of Companies ; 2nd Edition. By Sweet and Maxwell. Price 10*s.* 6*d.*

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Calcutta Law Journal	Do.
Calcutta Weekly Notes	Do.
Canada Law Journal	Do.
Canada Law Times	Do.
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Central Law Journal	Do.
Chicago Legal News	Do.
Criminal Law Journal	Do.
Green Bag	Do.
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Hindustan Review	Do.
Kathiawar Law Reports	Do.
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Law Notes	Do.
Law Students' Helper	Do.
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Michigan Law Review	Do.
Police Service Magazine	Do.
Punjab Law Reporter	Do.
The Law Journal	Do.
The Lawyer	Do.